

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	CC Docket No. 01-338
Review of Section 251 Unbundling)	
Obligations of Incumbent)	
Local Exchange Carriers)	
)	
Implementation of the Local)	
Competition Provisions of)	CC Docket No. 96-98
The Telecommunications Act of 1996)	
)	
Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced Telecommunications Capability)	

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. (“Nextel”), by its attorneys, hereby submits these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) December 20, 2001 Notice of Proposed Rulemaking (“Notice”) reviewing incumbent local exchange carrier’s (“ILEC”) obligations to provide specified unbundled network elements (“UNEs”) to competing telecommunications service providers.¹

In sections 251(c)(3) and 251(d)(2) of the Telecommunications Act of 1996 (“1996 Act”), Congress directed the FCC to determine the circumstances under which ILECs are obliged to make functions and elements of their regulated telecommunications networks available to requesting telecommunications carriers on unbundled, cost-based terms.² Specifically, the Commission was required to determine when an ILEC’s failure to provide access to a particular

¹ Review of the Section 251 Unbundling Obligations of Incumbent Exchange Carriers, *Notice of Proposed Rulemaking*, CC Docket No. 01-338 (rel. Dec. 20, 2001) (“*Notice*”).

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 251 *et. seq.*; *see* 47 U.S.C. § 251(c)(3), (d)(2) (“1996 Act” or the “Act”).

network element would “impair” the ability of the requesting carrier to offer a particular service.³ In both its initial *Local Competition Order*, and its more recent *UNE Remand Order*, the Commission concluded that requesting telecommunications carriers are impaired if they are not provided with access to ILEC interoffice transmission facilities on a dedicated basis.⁴ Because there has been no erosion of overwhelming ILEC dominance in provision of these facilities, there is every reason for the Commission, at the conclusion of its review, to maintain dedicated transmission facilities as a UNE available on request to telecommunications carriers.

Further, due to the circumstances of the physical network of Commercial Mobile Radio Service (“CMRS”) providers, CMRS providers rely upon ILEC provision of dedicated transport facilities between the CMRS carrier switch, known as a Mobile Switching Center (“MSC”), and the numerous base station cell sites CMRS carriers must maintain throughout a geographic area to provide radio coverage of a market. While ILECs uniformly have refused to provide this transport function to CMRS carriers as a UNE, the Commission has requested comment on whether its definition of dedicated transport should be expanded to include this form of dedicated transport.⁵ Nextel urges the Commission to take this opportunity to broaden its definition of dedicated transmission to include the use CMRS carriers make of ILEC dedicated transmission facilities.

CMRS carriers are facilities-based telecommunications carriers. Over time, CMRS carriers can be expected to provide competition to ILECs, the type of facilities-based competition

³ 47 U.S.C. § 251(d)(2)(B).

⁴ See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499, 15718 (1996) (“*Local Competition Order*”) (subsequent history omitted); Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Third Report and Order*, 15 FCC Rcd 3696, 3833-34 (1999) (“*UNE Remand Order*”) (subsequent history omitted).

⁵ Notice at ¶¶61-2.

expressly envisioned in the pro-competitive framework of the 1996 Act. By broadening its definition of dedicated transport to include the ILEC-provided transport most often used by CMRS carriers, the Commission will eliminate an unnecessary competitive obstacle that ILECs uniformly have interposed to CMRS competition, thus advancing a major policy objective of the 1996 Act.

I. THE COMMISSION SHOULD REFINE ITS UNE LIST AND CONFIRM THAT DEDICATED TRANSMISSION IS STILL NECESSARY TO COMPETITORS.

Recognizing that circumstances change over time, the Commission has committed to a periodic review every three years of the continuing need for each of the elements it has designated as a UNE.⁶ Such a periodic review allows the Commission to better calibrate the obligations it chooses to impose on an ILEC in light of the circumstances present in the evolving competitive market.⁷

CMRS carriers, in order to be competitive with other CMRS providers, compete on price and service coverage.⁸ This competition is intense and increasing. Every CMRS carrier that intends to survive must invest enormous sums in the deployment and continuous upgrading of its wireless network.⁹ Wireless coverage over a single geographic market may require the installation and operation of literally hundreds of cell sites, each of which must be linked to the MSC in order for wireless calls to be completed. ILEC-provided dedicated transport is by far the most common and effective way to connect the CMRS carriers' MSCs to each such cell site.

⁶ *UNE Remand Order* at 3766.

⁷ *Notice* at ¶1.

⁸ Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Sixth Report*, 16 FCC Rcd 13350, 13377-13378 (2001).

⁹ *See id.* at 13374-13375.

As the Commission previously has recognized, it is “prohibitively expensive” for competing carriers to self-provision ubiquitous dedicated transmission facilities.¹⁰ CMRS carriers face the same prohibitive costs to furnish facilities that competitive wireline carriers face, including the cost of deploying fiber optic networks using public rights of way, trenching, as well as the cost of purchasing and collocating the necessary transmission equipment.

CMRS carriers, therefore, have no practical alternatives to obtaining transport services from ILECs to link their cell sites and switches. As the Joint Petition of VoiceStream and AT&T Wireless observes, ILECs have categorically refused to offer dedicated transport to CMRS carriers as a UNE.¹¹ This leaves wireless carriers no option but to obtain ILEC transport as a tariffed special access service, with higher end user rates charged for the provision of the very same transport functionality.

ILECs should not be permitted to hide behind a UNE definition of dedicated transmission that aids and abets their ability to collect unnecessarily excessive charges from a competing telecommunications service provider. As discussed below, the Commission has the opportunity in this proceeding to remedy this situation by broadening its definition of dedicated transport to make plain that ILECs are required to offer dedicated transport from a CMRS carrier’s cell site to its switch as a UNE.

¹⁰ *UNE Remand Order* at 3855-56.

¹¹ *Petition for Declaratory Ruling of AT&T Wireless and VoiceStream Wireless Corporation*, CC Docket No. 96-98 (Nov. 19, 2001) (“*AT&T/VoiceStream Petition*”); *Notice* at ¶61.

II. THE DEFINITION OF DEDICATED TRANSPORT SHOULD BE BROADENED TO INCLUDE ILEC TRANSPORT THAT LINKS CELL SITES TO CMRS SWITCHES.

Access to ILEC dedicated transport functionality for the linking of cell sites and switches is uniquely important to CMRS carriers. CMRS carriers' cell sites typically extend outside of city centers into suburban and rural areas. In many cases, therefore, ILECs have the only existing ubiquitous transport facilities available for linking cell sites to switches.

In the *UNE Remand Order*, the Commission identified several factors to aid in determining whether competitors are entitled to access to particular ILEC facilities on an unbundled basis under Section 251(d)(2)(B)'s impairment standard. Generally, the Commission has found that competitive carriers are impaired if they have access to alternative facilities, but that these facilities are unequal to ILEC facilities with respect to their cost, ubiquity, quality, timeliness and operations.¹² The Commission also observed that it would consider whether an unbundling requirement is likely to encourage local telecommunications competition, promote facilities-based competition and provide market certainty to attract investment.¹³

¹² *UNE Remand Order* at 3713. Specifically, the Commission observed:

Although we may not be able to identify with precision a competitor's incentives, or lack of incentives to enter a particular market, we nonetheless find that evidence demonstrating the lack of competition in certain areas of the country and among certain classes of customers is a strong indicator that there may exist economic and other types of barriers that may, at a minimum, impair a competitor's ability to compete vis-a-vis the incumbent. Accordingly, based on evidence provided in the record, we use our administrative judgment to identify several factors, *including cost, ubiquity, quality, timeliness, and operational impediments*, that we find particularly helpful in explaining whether a competitor's ability to provide the service it seeks to offer is impaired without access to a particular unbundled network element. Based on the actual state of competition, we look at these factors and their relationship to alternative sources of network elements to determine *whether the alternatives are actually available as a practical, economic, and operational matter* (emphasis added).

¹³ *Id.* at 3746-7. Specifically, the Commission concluded:

Accordingly, in addition to the "necessary" and "impair" standard, we conclude that we may consider several factors, set out below, that further the goals of the Act in accordance with the Supreme Court's directive. . . . To further the goal of opening the local market to competition, we *may consider how access to specific unbundled network elements will encourage the rapid*

On the specific issue of ILEC dedicated transmission facilities, the Commission recognized that carriers have only two alternatives beyond getting transport from the ILEC: that of self-provisioning or requesting those facilities from non-ILEC service providers. The Commission determined that either of these alternatives: (i) materially increase the cost of entering a market or expanding the scope of a carrier's services in a market, (ii) delay broad-based entry and (iii) materially limit the scope and quality of a requesting carrier's service offerings.¹⁴

These conclusions in the *UNE Remand Order* remain completely accurate in the current telecommunications market environment. Indeed, they are the same reasons why the Commission, in this proceeding, ought to expand the availability of the dedicated transmission UNE to ILEC transport provided beyond the interoffice transmission segment of carrier networks.

As the Commission is aware, some CMRS carriers, for some routes, use point-to-point microwave as a limited alternative to ILEC provision of transport. CMRS carriers, however, require ubiquitous transport capability to link cells to switches everywhere they offer service, including outside of major population centers. CMRS carriers cannot have reasonable assurance, however, that they can become licensed for a point-to-point microwave path between a particular cell site and the MSC. For this reason, Nextel and other CMRS carriers have largely come to

introduction of local competition to the benefit of the greatest number of consumers. . . We may also consider how the unbundling rules we adopt will promote facilities-based competition by competitive LECs. We believe that it is the development of facilities-based competition that will provide both incumbent and competitive LECs with the incentives to innovate and invest in new technologies. . . We may further consider whether unbundling particular network elements will provide certainty in the market so that competitive LECs can attract investment capital and execute their business plans (emphasis added).

¹⁴ *Id.* at 3842.

rely upon ILECs to provide wired access between cell sites and CMRS MSCs. As a result, self-provisioning of the transport portion of a CMRS network is not common.

While Nextel plainly would prefer not to rely upon ILECs for provision of this transport function, there are no viable competing carrier service alternatives to ILEC provisioned transport. While Nextel tries, where possible, to use competitive LECs for transport, the pool of CLECs available to provide ubiquitous cell site/MSC transport function is literally non-existent.¹⁵ There are no CLECs that can provide CMRS carriers with service that is roughly equivalent in terms of ubiquity, timeliness and operational compatibility to that available from the ILECs.

In the *UNE Remand Order*, the Commission concluded that competitive carriers are impaired if they are denied access to interoffice dedicated transport. The impairment finding was based upon the Commission's concern that there are no viable alternatives available to competitive carriers when looking at carrier options from a practical, economic and operational perspective.¹⁶

This same impairment analysis should apply to the dedicated transport ILECs provide to CMRS carriers to link CMRS cell sites and switches. While theoretically CMRS carriers could build their own landline facilities to each cell site, such an expense would represent a daunting additional expense beyond the enormous sums CMRS carriers routinely expend to develop the

¹⁵ See Kevin Fitchard, *McLeod Bondholders To Decide: Little Now or Chapter 11 Later*, TELEPHONY (January 14, 2002) (noting that Winstar Communications, a fixed wireless provider, went bankrupt, and the bankruptcy proceeding set the tone for the expected future bankruptcy proceedings of other competitive local exchange carriers); See also Michael Finneran, *New Values for New Times*, BUSINESS COMMUNICATIONS REVIEW, No. 1, Vol. 32, p. 16 (January 1, 2002) (noting that of the full-service CLECs, none seem to be close to profitability); See also Jeffrey Silva, *The Big Hunt*, RCR WIRELESS NEWS, p. 12 (October 22, 2001) (noting that the top fixed wireless firms are financially challenged, "if not dead.").

¹⁶ *UNE Remand Order* at 3842.

cell site and switching infrastructure and provide their customers with ever greater radio service coverage areas.

Currently, the Commission defines dedicated transmission as:

incumbent LEC transmission facilities...dedicated to a particular customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers.¹⁷

The “interoffice” limitation on the definition of dedicated transport has limited the availability of dedicated transmission as a UNE to CMRS carriers. As demonstrated in the Joint Petition of VoiceStream and AT&T Wireless, ILEC refusal to provide this transport on terms other than as end user special access leaves CMRS carriers without effective recourse.¹⁸ CMRS carriers must obtain dedicated transport services from ILECs under the terms of special access tariffs or under contracts based on those tariffs.¹⁹ This impairs CMRS carriers not only because they must pay higher rates, but also because there is no statutory guarantee that the ILEC will provide its services in a dependable, non-discriminatory fashion.

The implications of Commission failure to reclassify ILEC provision of dedicated transport as a special access service to a UNE available to CMRS providers is significant. Plainly, if the Commission’s UNE rules do not apply to CMRS dedicated transport then an ILEC’s refusal to provide dedicated transport on reasonable terms will likely not be used by the Commission in evaluating how well a Regional Bell Operating Company, for example, has

¹⁷ 47 CFR § 51.319(d)(1)(i).

¹⁸ *AT&T/VoiceStream Petition* at 13-14.

¹⁹ In this context, the Commission has rejected the argument that competing carriers are not impaired if they can obtain the necessary facilities from an ILEC tariff. Specifically, the Commission concluded that it would assign “little weight” in its impairment analysis to the “ability of requesting carriers to use the incumbent LECs’ resold or retail tariffed services as alternatives to unbundled network elements.” *UNE Remand Order* at 3732.

opened its market to competition. This is despite the fact that an ILEC refusal to provide dedicated transport on UNE terms causes CMRS carriers competitive harm and viable alternatives to this necessary network input are not readily available.

The Commission should revise its definition to make plain that CMRS carriers are allowed to convert transmission facilities purchased from ILEC special access or private line tariffs to unbundled dedicated transport, including transport to and from CMRS base stations.

Nextel proposes the following revised definition of dedicated transmission facilities:

incumbent LEC transmission facilities...dedicated to a particular customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers, **or between mobile switching centers and cell sites owned by incumbent LECs or requesting telecommunications carriers.**

III. CONCLUSION

This proceeding offers the Commission an opportunity to remedy a competitive disadvantage that CMRS carriers face in the market. By broadening the definition of dedicated transmission contained in the UNE rules, the Commission will encourage local telephone competition by promoting the opportunity for wireless facilities-based competition.

Respectfully submitted,

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